IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ELLIS B. BOUVIER, Appellant.	No. 37910-4-II (consolidated with No. 37914-7-II) UNPUBLISHED OPINION

Quinn-Brintnall, J. — Ellis Bouvier appeals his convictions for two felony violations of a no-contact order, arguing that (1) the State failed to present sufficient evidence, (2) the trial court erred by imposing consecutive sentences, and (3) his trial counsel denied him effective assistance. We conclude that the State presented sufficient evidence and that Bouvier does not demonstrate ineffective assistance, therefore we affirm his convictions.[1] But we conclude that the trial court erred in imposing consecutive sentences and remand for resentencing.

FACTS

2007 Incident

On December 21, 2007, Trooper Joshua Merritt saw a vehicle at the intersection of Pine

[1] A commissioner of this court initially considered Bouvier's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

Acres Way and State Route 102 in Shelton. He saw a female driver and a male passenger who appeared not to be wearing a seat belt. He turned his patrol car around but by the time he approached the vehicle, the driver, Jamie Delamarter, was walking away and the passenger, Bouvier, was gone. He saw someone he thought was Bouvier hiding behind a tree. He ordered Bouvier to come out, but Bouvier ran instead. Merritt and another trooper ran after Bouvier but were unable to apprehend him. Although she initially denied knowing who her passenger was, Delamarter eventually told Merritt that he was Bouvier. Merritt learned from a dispatcher that a valid no-contact order prohibited Bouvier from contacting Delamarter. A short time later, other officers apprehended Bouvier.

The State charged Bouvier with felony violation of a no-contact order.[2] Trooper Merritt testified as described above. Delamarter testified that it was she who contacted Bouvier when she was retrieving personal items from Bouvier's home on Pine Acres Way. She testified that she opened her passenger door and that Bouvier crouched down to say that they could not have contact. She denied that he ever got into her vehicle. Bouvier testified similarly that Delamarter contacted him and that he told her they could not have contact. He testified that her dog jumped out of the vehicle and he pursued the dog. The jury found Bouvier guilty.

2008 Incident

During an interview with his community corrections officer (CCO), Bill Corbett, on January 28, 2008, Bouvier admitted that he had been to his home on Pine Acres Way to retrieve a vehicle. Corbett was aware that the no-contact order prohibited Bouvier from being within 1,000 feet of Delamarter's residence. Corbett had been to the home on Pine Acres Way on January 25,

[2] The State also charged Bouvier with unlawful possession of a controlled substance, but the jury acquitted him of that charge.

2008, and Delamarter was there at the time he visited. Corbett obtained a Department of Licensing record listing Delamarter's residence as the home on Pine Acres Way.

The State charged Bouvier with felony violation of a no-contact order. Corbett and another CCO testified as described above. Bouvier testified that he went to his home to pick up a vehicle that he had purchased from Delamarter, although the vehicle was still registered to her. He testified that he did not think Delamarter was living in the house when he went to pick up the vehicle. The jury found Bouvier guilty.

Sentencing

The trial court sentenced Bouvier for both the 2007 incident and the 2008 incident on May 12, 2008. It imposed a standard range sentence of 15 months for the 2007 incident and a standard range sentence of 15 months for the 2008 incident, consecutive to each other.

ANALYSIS

Insufficient Evidence

Bouvier argues that the State failed to present sufficient evidence that he willfully violated the no-contact order in either the 2007 incident or the 2008 incident. He contends that because it was Delamarter who initiated the contact in the 2007 incident and, because both he and Delamarter testified that he had never gotten into Delamarter's vehicle, the State did not present sufficient evidence that he willfully violated the no-contact order. He contends that because he believed that Delamarter was not living in the Pine Acres Way home when he went there in 2008, the State did not present sufficient evidence that he willfully violated the no-contact order.

Evidence is sufficient to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light

most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). An appellant claiming insufficiency of the evidence "'admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.'" *Thomas*, 150 Wn.2d at 874 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

Taking the evidence in the 2007 incident in the light most favorable to the State, Trooper Merritt saw Bouvier in the passenger seat of Delamarter's vehicle. Delamarter initially refused to identify Bouvier as the passenger in her vehicle. When Merritt saw Bouvier in the nearby woods and directed him to come out, Bouvier fled into the woods. A valid no-contact order prohibited Bouvier from contacting Delamarter. Even if Delamarter initiated the contact, the order still prohibited Bouvier from interacting with her. *State v. Sisemore*, 114 Wn. App. 75, 79, 55 P.3d 1178 (2002). A rational jury could find beyond a reasonable doubt that Bouvier willfully violated the no-contact order. Sufficient evidence supports the jury's verdict in the 2007 incident.

Taking the evidence in the 2008 incident in the light most favorable to the State, Delamarter was living in the home on Pine Acres Way when he went there to take a vehicle that was registered to Delamarter. Corbett, Bouvier's CCO, had seen Delamarter at the residence on January 25, 2008, and Delamarter's driver's licensing record listed her address as the home on Pine Acres Way. A valid no-contact order prohibited Bouvier from coming within 1,000 feet of Delamarter's residence. A rational jury could find beyond a reasonable doubt that Bouvier willfully violated the no-contact order. Sufficient evidence supports the jury's verdict in the 2008 incident.

Consecutive Sentences

Bouvier argues that the trial court erred by imposing consecutive sentences for the 2007 incident and the 2008 incident. He contends that under RCW 9.94A.525(1), all convictions for which sentences are imposed on the same date are "other current offenses" and that under RCW 9.94A.589(1)(a), sentences for all "other current offenses" are to be served concurrently unless grounds exist for an exceptional sentence. The State argues that because the trial court found that the two convictions were not parts of the "same criminal conduct" under RCW 9.94A.589(1)(a), it had the authority to make the sentences consecutive.

Bouvier is correct. RCW 9.94A.525(1) provides that "[c]onvictions entered *or* sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." (Emphasis added.) Bouvier was sentenced for the 2007 incident and the 2008 incident on the same date. Under RCW 9.94A.589(1)(a), "[s]entences imposed under this subsection *shall* be served concurrently" (emphasis added) and "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of [former] RCW 9.94A.535 [2005]." The State did not seek an exceptional sentence under former RCW 9.94A.535. A trial court's determination that convictions are "same criminal conduct" under RCW 9.94A.589(1)(a) only affects the calculation of the defendant's offender score. *State v. Fisher*, 139 Wn. App. 578, 586, 161 P.3d 1054 (2007). The trial court erred in making the sentences for Bouvier's two convictions consecutive to each other. We remand for resentencing.

Ineffective Assistance of Counsel

In his statement of additional grounds under RAP 10.10, Bouvier contends that he was

denied effective assistance of counsel because his trial counsel (1) did not challenge Trooper Merritt's ability to observe inside Delamarter's vehicle; (2) did not argue that there was no basis for Merritt to contact Delamarter's vehicle because it was stopped on a private road; (3) did not object to the introduction of the licensing report showing Delamarter's address as the home on Pine Acres Way; (4) did not introduce evidence that on January 25, 2008, the home on Pine Acres Way was uninhabitable due to a broken septic system; (5) did not call Delamarter as a witness regarding the 2008 incident; and (6) did not argue that the CCOs perjured themselves when they testified differently from their statements.

To demonstrate ineffective assistance of counsel, a defendant must show (1) that his trial counsel's performance was deficient and (2) that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the trial result would have been different, thereby undermining this court's confidence in the outcome. *Strickland*, 466 U.S. at 694; *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If a defendant fails to establish either element, this court need not address the other element because an ineffective assistance of counsel claim fails without proof of both elements. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Bouvier's counsel's decision to argue that the 2007 incident was not a willful violation of the no-contact order, rather than to challenge Trooper Merritt's ability to observe, was a tactical

decision that cannot be challenged as deficient performance. *McFarland*, 127 Wn.2d at 336. Merritt said he saw exhaust coming from Delamarter's vehicle when it was stopped at the intersection with State Route 102, so he had the authority to contact Delamarter for the seat belt violation. Bouvier does not show grounds for the exclusion of Delamarter's licensing record, so he does not show his counsel was deficient in not moving to exclude that record. He does not show that his counsel knew of the condition of the home on January 25, 2008, or provide any evidence to support his claim that the home was uninhabitable. He does not show that Delamarter was available for trial or how her testimony would have changed the result of his trial on the 2008 incident. Finally, he does not show that any differences between the statements of the CCOs and their testimony rose to the level of perjury and he does not show that, had his counsel pointed out those differences, the result of his trial probably would have been different. Bouvier does not demonstrate ineffective assistance of counsel.

We affirm Bouvier's convictions but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, C.J.

PENOYAR, J.